

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## **Advice Memorandum**

DATE: May 4, 2005

TO : James J. McDermott, Regional Director  
Region 31

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Ralphs Grocery Company  
Case 31-CA-27229

596-0420-5087

596-0420-5500

This Section 8(a)(5) case was submitted for advice on whether the Employer's post-contract expiration failure to make Trust Fund contributions for locked out employees rehired under false names and social security numbers is barred from attack under Section 10(b) because the Employer initially concealed its conduct.

We conclude that complaint on the instant charge is 10(b) barred. Although the Charging Party Trustees may not have known the full extent of the Employer's unlawful failure to make contributions, they had clear and unequivocal notice of the violation outside the 10(b) period.

### FACTS

The instant charge, filed on February 23, 2005, alleges that Ralphs failed to make contributions to contractual Joint Trust Funds on behalf of surreptitiously hired employees. The Charging Parties are the seven Union trustees (one union representative from each of the seven UFCW Locals) and the four employer trustees (one representative from each employer. Although there is an unequal number of union and employer trustees, block voting is allowed under the trust agreement. Thus, the union trustees' block vote is equal to the employer trustees' block vote.

This charge is related to charges in the prior case against Ralphs previously submitted to Advice and now pending before the Office of Appeals. The prior case arose in October 2003 after the parties' bargaining agreement had expired, the UFCW Locals struck Vons, and Ralphs and Albertson's responded by locking out all bargaining unit employees except the pharmacists. During the course of the strike/lockout, Ralphs rehired numerous locked out

employees surreptitiously, using false names and social security numbers.<sup>1</sup>

Under the expired bargaining agreement between the seven UFCW Locals and the multi-employer association comprised of Ralphs, Albertsons, and Vons/Pavilions, Ralphs was obligated to make contributions to the drug industry trust funds on behalf of the pharmacist unit employees. During the strike/lockout, Ralphs paid those contributions on behalf of the pharmacists. The expired bargaining agreement also required Ralphs to make contributions to the Joint Trust Funds on behalf of non-pharmacist unit employees. Ralphs did not pay contributions to these Trust Funds.

Contributions on hours worked by non-pharmacist unit employees each month were payable to the Joint Trust Fund on or before the 20<sup>th</sup> of the following month. Attached to these monthly contributions were self-generated reports of the hours each employee worked. The Trust Funds only verified reported hours through compliance audits done every three years. The Trust Fund's last compliance audit was conducted in 1999. Although a compliance audit normally would have occurred in 2003, no audit was conducted because of the labor dispute.

Soon after the lockout began, the Unions received evidence that Ralphs had rehired locked out employees under false names and/or social security numbers. In November 2003, one of the seven unions filed a charge alleging that Ralphs was unlawfully re-hiring some locked out employees. In the following months, charges were filed on behalf of all the UFCW Locals alleging that Ralphs' lockout was unlawful because Ralphs had re-hired locked out employees under false names and/or social security numbers.

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<sup>1</sup> In the prior Advice Memorandum in the prior cases, dated September 20, 2004, we concluded that Ralphs' surreptitious rehiring of locked out employees did not make the lockout itself unlawful because the rehiring was limited in both scope and effect, and there was insufficient evidence of antiunion animus. Advice did find a Section 8(a)(5) violation because Ralphs engaged in unlawful direct dealing with the rehired employees, negotiating terms and conditions different from those in the expired bargaining agreement. This memorandum does not deal with whether Ralphs' unlawful failure to make Trust Fund contributions may be attacked under that prior, timely filed Section 8(a)(5) charge.

Throughout the Region's investigation of these charges, Ralphs repeatedly denied that it had knowledge of any locked out bargaining unit employees working at its stores under false names and/or social security numbers. Beginning in late 2003 or early 2004, the US Attorney for the Central District of California commenced a criminal investigation into allegations that Ralphs was hiring employees under false names and social security numbers. The Region was advised by the US Attorney's office that Ralphs was refusing to cooperate fully with that investigation.

On January 5, 2004, two Union Trustees of the Joint Trust Funds filed a complaint in district court alleging that Ralphs knowingly hired locked out employees under false names and social security numbers and "knowingly failed to disclose hours worked by many covered employees and to make the contributions owing to the Trust Funds for such hours." The complaint was filed upon general belief and knowledge, but without particular evidence, with the intent to gather specific evidence during discovery. The Union Trustee plaintiffs eventually withdrew this complaint because they had not sued on behalf of the Trust Fund, and they lacked standing to bring this suit as individual trustees.

On February 10, 2004, at a Board of Trustees meeting, Union Trustees announced that they had reason to believe that at least two employers were employing Union employees during the lockout without making contributions to the Trust Funds. A Union Trustee requested an audit of the contributions from Ralphs, Albertson's, and Vons/Pavilions. The Employer Trustees opposed the audit as a block. The parties deadlocked; no audit was authorized.

On July 27, 2004, John Burgon, President of Ralphs, wrote a letter to all Ralphs' employees stating that Ralphs' may have permitted locked out employees to work during the lockout under false names and/or social security numbers. The letter stated that any managers and supervisors who had engaged in such practice would be disciplined. On August 10, 2004, the Trustees of the Trust Funds agreed to conduct an audit of Ralphs' contributions.<sup>2</sup>

On February 8, 2005, the Charging Parties received the Ralphs audit which found that: (1) Ralphs failed to report the identities of unit employees working under false names

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<sup>2</sup> Since the charge in this case was filed on February 23, 2005, the Trust Fund's August 10 decision to audit occurred around two weeks before the beginning of the 10(b) period.

and/or social security numbers; (2) Ralphs failed to report the hours these employees worked; and (3) Ralphs failed to pay contributions on the behalf of these employees. The Charging Parties demanded that Ralphs pay \$872,180.97 for contributions it failed to make during the period October 1, 2003, through April 30, 2004. To date, Ralphs has not made any payment to the Joint Trust Funds for these contributions.

#### ACTION

The charge should be dismissed as barred by 10(b) because the Charging Party Trustees had clear and unequivocal notice of the Employer's unlawful failure to make contributions outside the 10(b) period.

Section 10(b) bars action based on conduct occurring more than six months prior to a properly filed charge. However, Section 10(b) does not begin to run until the aggrieved party, using due diligence, "receives clear and unequivocal notice . . . either actual or constructive . . . of the acts that constitute the alleged unfair labor practice, i.e., until the aggrieved party knows that his statutory rights have been violated."<sup>3</sup> "[I]t is knowledge of the act or event to be challenged that triggers Section 10(b); there is no requirement that an affected party have knowledge of all the circumstances leading up to, or surrounding, the event in issue."<sup>4</sup>

In IBEW Local 25 (SMG),<sup>5</sup> an employee who was registered for light duty on the union's exclusive hiring hall learned from fellow employees that another named employee had been hired by the employee's employer to perform light duty. The employee averred that she did not believe those employees, thought they were joking, and made no timely attempt to confirm this "rumor." The ALJ, adopted by the Board, found that the employee's Section 8(b)(1)(A) charge against the union, filed more than six months after she acquired this knowledge, was barred by 10(b): "[the employee] possessed facts which were sufficient to create a suspicion that an unfair labor practice had occurred." Id. At 500.

In the instant case, the Union Trustees suspected Ralph's failure to make Trust Fund contributions as early as

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<sup>3</sup> John Morrell, 301 NLRB 896, 899 (1991).

<sup>4</sup> R.P.C., Inc., 311 NLRB 232, 234 (1993) (knowledge of the fact of the union affiliation, alleged to be unlawful more than six months later, sufficient to trigger 10(b)).

<sup>5</sup> 321 NLRB 498 (1996).

January and February when they first filed a district court suit and then sought an audit. After Ralphs essentially admitted its surreptitious behavior in July, all the Trustees on August 10 voted to audit Ralphs' contributions. By this date, two weeks before the 10(b) period, even the Employer Trustees believed that Ralphs was not making contributions and that an audit was appropriate. We thus conclude that the aggrieved Charging Party Trustees also had sufficient suspicion of the instant alleged violation to file a charge.

We recognize that Ralphs had filed false Trust Fund reports, omitting the hours worked by the surreptitiously rehired employees. Ralphs thus arguably concealed material facts of its Section 8(a)(5) violation. However, in July and early August, Ralphs ceased this concealment and the Trustees acted to start an audit. Thus, notwithstanding Ralphs' initial concealment, the Charging Party Trustees had sufficient information outside the 10(b) period to know that their statutory rights had been violated.

Accordingly, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.